

# AMERICAN LEGISLATIVE EXCHANGE COUNCIL

## MEMORANDUM

**To:** Civil Justice Task Force Members  
**From:** Amy Kjose, Civil Justice Task Force Director  
**Date:** October 27, 2010  
**Re:** 35 DAY MAILING – State and Nation Policy Summit: Civil Justice Task Force

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The American Legislative Exchange Council will host its State and Nation Policy Summit from **December 1-3** at the **Grand Hyatt Washington in Washington, D.C.** If you have not registered for the conference, you may do so at [www.alec.org](http://www.alec.org).

### About This 35-Day Mailing

This is an electronic-only 35-Day Mailing. In addition to receiving the 35-Day Mailing via e-mail, you may also access it on the Civil Justice Task Force's web page at <http://www.alec.org>. Keep in mind that you will need your ALEC username and password to access the 35-Day Mailing online. If you don't have an ALEC log-in, or if you'd like to change your username and password, contact Briana Mulder at 202-742-8507 or by email at [bmulder@alec.org](mailto:bmulder@alec.org). Conversely, if you choose to receive 35-Day Mailings "snail-mailed" to you, please let me know. We will assume that you prefer the 35-Day Mailing e-mailed to you unless you indicate otherwise.

### Meetings Civil Justice Task Force Members Should Attend:

- Civil Justice Task Force Meeting, **2:30-5:30pm, Friday, December 3**
- Smart-on-Crime Legislatures: Fighting Overcriminalization and Restoring the Proper Federal-State Equilibrium on Criminal Law and Justice Workshop, **9:30-10:45am, Friday, December 3**

### Please find the following materials enclosed:

- SNPS Tentative Agenda, Registration Materials, and Reimbursement Policy
- Working Agenda for the Civil Justice Task Force Meeting
- ALEC Mission Statement & Task Force Operating Procedures
- Submitted Legislation and accompanying discussion pieces:
  - Transparency in Lawsuits Protection Act and Discussion
  - Resolution Regarding Codification of the Judicial *Cy-Pres* Doctrine
- Civil Justice Task Force Roster

**Travel and Accommodations:** The conference hotel for SNPS is the **Grand Hyatt Washington** located at 1000 H Street NW, Washington, D.C.

**For State Legislators:** Civil Justice Task Force public sector members should contact their State Chairs to inquire about scholarship money to attend the conference. See the attached reimbursement policy for procedures.

I look forward to seeing you in Washington. If you have any questions or comments regarding the meeting, please contact me at (202) 742-8510 or by e-mail at [akjose@alec.org](mailto:akjose@alec.org).

# AMERICAN LEGISLATIVE EXCHANGE COUNCIL

## Civil Justice Task Force Meeting

States and Nation Policy Summit | Grand Hyatt Washington | Washington, D.C.

December 3, 2010 | 2:30 p.m.-5:30 p.m.

### 2:30 p.m. **Welcome and Introductions**

*Senator William J. Seitz, III (OH), Civil Justice Task Force Co-Chair*

*Victor Schwartz, Partner, Shook, Hardy & Bacon; Civil Justice Task Force Co-Chair*

### 2:45 p.m. **Task Force Update**

*Amy Kjose, Civil Justice Task Force Director, ALEC*

### 2:50 p.m. **Civil Justice State Legislative Reform Update**

*Matt Fullenbaum, Director of Legislation, American Tort Reform Association (ATRA)*

### 3:00 p.m. **PRESENTATION: Materials on Tort Reform**

*Professor Andrew F. Popper*

Professor Popper has compiled a book of essays on tort reform, covering some of the most dynamic aspects. In addition to his introductory piece in the book, the compilation features 28 essays from some of the most important lawyers, policy makers, and academics on tort reform. Viewpoints represented include pro- and anti-, academic and political, Republican and Democrat.

### 3:15 p.m. **UPDATE: On the Status of “Promoting ‘Merit’ in ‘Merit Selection:’ Best Practices in Commission-Based Judicial Selection”**

*Page Faulk, Vice President of Policy and Research,  
U.S. Chamber Institute for Legal Reform*

Ms. Faulk will discuss the status of legislation discussed at the Annual Meeting that would provide best practices for states with judicial merit selection systems. The Task Force is not expected to vote on a model bill at this meeting.

### 3:25 p.m. **PRESENTATION: Perspectives of a Former ATLA Executive: How to Achieve Success with Rational Civil Justice Reform**

*Robert Lembo, formerly with the Association of Trial Lawyers of America*

Mr. Lembo will provide insight into the activities of the American Association of Justice and its state-level affiliates, and will offer perspective on reforming state legal systems.

**3:45 p.m. DISCUSSION AND VOTE: Resolution Regarding Codification of the Judicial Cy Pres Doctrine**  
*Cy Pres Resolution Development Working Group*

Following the meeting of the Cy Pres Working Group at the Annual Meeting, members have collaborated to refocus the Resolution. Those involved in drafting the Resolution will explain the issue and the approach taken, after which a vote on the Resolution is expected.

**4:15 p.m. ROUNDTABLE DISCUSSION: Legislative Victories and Prospects for 2011**  
*Moderated by Senator William J. Seitz, III (OH), Civil Justice Task Force Co-Chair*

This session will provide Civil Justice Task Force members in attendance the opportunity to discuss legislative achievements in 2010 and expected legislative initiatives for 2011.

**4:45 p.m. PRESENTATION: Ranking State Tort Systems**  
2010 Tort Liability Index  
*Dr. Lawrence McQuillan, Pacific Research Institute*

Dr. McQuillan will provide a makeup presentation on his 2010 Tort Liability Index, a publication ranking the states on their tort systems based on a variety of variables, many of which reflect ALEC Civil Justice Task Force policy.

**5:00 p.m. AMENDMENT: The Transparency in Lawsuits Protection Act**  
*Mr. Christopher Appel, Shook, Hardy & Bacon LLP*

The American Law Institute's recently released Restatement may cause further implied causes of action to be found in statutes. The minor amendments to our model bill, already poised to keep implied causes of action from being interpreted where they don't explicitly exist, will ensure that the legislature will still need to be explicit to create such a right.

**5:15 p.m. For the Good of the Order**

**5:30 p.m. Adjournment**

## 2010 States & Nation Policy Summit Agenda\*

<b>Tuesday, November 30th</b>		
Joint Board of Directors Meetings	8:00 a.m. - 5:30 p.m.	Farragut/Lafayette
Registration	12:00 p.m. - 5:00 p.m.	Independence Foyer
ALEC Joint Board Reception and Dinner	6:30 p.m. - 9:30 p.m.	Off-site
<b>Wednesday, December 1st</b>		
Registration	7:30 a.m. - 5:00 p.m.	Independence Foyer
Task Force Subcommittee Meetings	8:00 a.m. - 11:45 a.m.	
Exhibit Hall	9:00 a.m. - 3:00 p.m.	Independence Foyer
State Chairs Meeting	9:00 a.m. - 11:45 a.m.	Willson/Roosevelt
New Legislator Orientation	10:30 a.m. - 11:30 a.m.	Franklin Square
<b>Opening Plenary Luncheon</b>	<b>12:00 p.m. - 2:00 p.m.</b>	Independence A
Task Force Chairs Meeting	2:15 p.m. - 3:15 p.m.	Franklin Square
Workshop I: Comparative Effectiveness	2:15 p.m. - 3:30 p.m.	Farragut/Lafayette
Research: Rationing Care or Improving Quality?		
Workshop II: Higher Education	3:45 p.m. - 5:00 p.m.	Farragut/Lafayette
National Chairman's Reception, <i>by invitation only</i>	5:30 p.m. - 6:30 p.m.	Independence IH
Hospitality Suite	9:00 p.m. - 11:00 p.m.	Congressional Parlor
<b>Thursday, December 2nd</b>		
Registration	7:30 a.m. - 5:00 p.m.	Independence Foyer
<b>Plenary Breakfast</b>	<b>8:00 a.m. - 9:15 a.m.</b>	Independence A
Exhibit Hall	9:00 a.m. - 3:00 p.m.	Independence Foyer
Workshop III: Show Me the Money: Budget Transparency in the States	9:30 a.m. - 10:45 a.m.	Farragut Square
Workshop IV: Delivering Justice to Rape Victims while Minimizing Taxpayer Cost	9:30 a.m. - 10:45 a.m.	Lafayette Park
Workshop V: Cutting Crime and Budgets: The National Movement	11:00 a.m. - 12:15 p.m.	Farragut Square
Workshop VI: EPA's Regulatory Assault: Higher Prices, Fewer Jobs, and Less Energy	11:00 a.m. - 12:15 p.m.	Lafayette Park
<b>Plenary Luncheon</b>	<b>12:30 p.m. - 2:15 p.m.</b>	Independence A
Task Force Meetings	2:30 p.m. - 5:30 p.m.	
• Energy, Environment, and Agriculture		Farragut/Lafayette
• Health and Human Services		Independence CDE
• Public Safety and Elections		Independence FG
• Tax and Fiscal Policy		Independence IH
Gala Holiday Reception	6:00 p.m. - 8:00 p.m.	Constitution AB
Hospitality Suite	9:00 p.m. - 11:00 p.m.	Congressional Parlor

<b>Friday, December 3rd</b>		
Registration	7:30 a.m. - 2:00 p.m.	Independence Foyer
<b>Plenary Breakfast</b>	<b>8:00 a.m. - 9:15 a.m.</b>	Independence A
Exhibit Hall	9:00 a.m. - 3:00 p.m.	Independence Foyer
Workshop VII: Federalism I	9:30 a.m. - 10:45 a.m.	Farragut Square
Workshop VIII: Overcriminalization	9:30 a.m. - 10:45 a.m.	Lafayette Park
Workshop IX: A Tax in Sheep's Clothing: How Extended Producer Responsibility Mandates Can Hurt Consumers and Business	11:00 a.m. - 12:15 p.m.	Farragut Square
Workshop X: Federalism II	11:00 a.m. - 12:15 p.m.	Lafayette Park
<b>Plenary Luncheon</b>	<b>12:30 p.m. - 2:15 p.m.</b>	Independence A
Task Force Meetings	2:30 p.m. - 5:30 p.m.	
• Civil Justice		Farragut/Lafayette
• Commerce, Insurance and Economic Development		Independence GHI
• Education		Independence CDE
• Telecommunications and Information Technology		Constitution A
• International Relations		Constitution B
Louisiana Preview Reception for 2011	5:30 p.m. - 6:30 p.m.	Franklin Square
Annual Meeting		
State Delegation Night	Beginning at 6:30 p.m.	See Your State Chair

\* Agenda subject to change.

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**Civil Justice Task Force Meeting  
ALEC's 2010 Annual Meeting  
August 6, 2010  
Meeting Minutes**

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Sen. Kirk Dillard, Illinois  
Rep. Kim Koppelman, North Dakota  
Rep. David Labriola, Connecticut  
Sen. Bill Seitz  
Rep. Matt Shea, Washington  
Rep. Greg Snowden, Mississippi  
Rep. Thad Viers, South Carolina  
Rep. Kelli Sobonya, West Virginia  
Rep. Jan Angel, Washington  
Sen. Bill Cadman, Colorado  
Rep. Vance Dennis, Tennessee  
Sen. Joey Fillingane, Mississippi  
Rep. Bill Denny, Mississippi  
Rep. Bryan Hughes, Texas  
Rep. Todd Hunter, Texas  
Rep. Marvin Kleeb, Kansas

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Sarah Lenti, US Chamber  
Roland Spies, State Farm  
John Sullivan, Civil Justice Assoc. of California  
Leah Lorber, GSK  
Ed Pickle, Shell Oil  
Christian Rataj, NAMIC  
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Roger Geiger, NFIB  
Eric Goldberg, AIA

David Golden, PCIAA  
Dennis Kearns, BNSF  
Garth Alston, Altria Client Services  
Joseph Cleary, Bayer  
Matt Fullenbaum, ATRA  
William Gallagher, Crown Cork & Seal  
Peter Holran, TASER International

Amy Kjose gave the task force update.

Matt Fullenbaum gave the state legislative reform update.

John Beisner spoke on third-party litigation financing.

Victor Schwartz and Sen. Bill Seitz presented on the ALI Third Restatement of Torts.

The Trespasser Responsibility Act passed unanimously.

Thomas Cohen spoke on civil bench and jury trials in state courts.

Sen. Seitz led a discussion on legislative victories in 2010 and expectations for 2011.

Rich Winget presented the US Chamber's Lawsuit Climate 2010: Ranking the States.

Tom Dawson and Alan Lange presented on their book Kings of Tort.

The Task Force agreed unanimously to table the merit selection best practices legislation and convene a working group to discuss the bill before introducing it again at SNPS.

# ATTENDEE

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Title \_\_\_\_\_

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\$ 925	\$ 1100	\$ _____
\$ 525	\$ 625	\$ _____
\$ 675	\$ 825	\$ _____
\$ 400	\$ 500	\$ _____
\$ 0	\$ 0	\$ _____

**TOTAL REGISTRATION FEES: \$ \_\_\_\_\_**

**Note:** Registration forms with enclosed payments must be postmarked by November 10, 2010 to be eligible for early registration rates. Forms and/or payments received after November 10 will be subject to the on-site registration rate. If registering after November 10, please bring completed form and payment to register on-site.

## REGISTRATION CONFIRMATION INFORMATION

Online registrants will receive immediate email confirmation. If registering by form, confirmation will be emailed, faxed, or mailed within 72 hours of receipt of payment.

## HOUSING

## RESERVATION CUTOFF FOR ALEC DISCOUNTED RATE IS NOVEMBER 4, 2010

**\*\*Save \$50 on registration by booking your hotel room in ALEC's headquarter hotel\*\***

I do not require a reservation at this time.

Arrival Date \_\_\_\_\_ Departure Date \_\_\_\_\_

Sharing room with \_\_\_\_\_

Room type

- Single (1 person – 1 bed) \$ 269
- Double (2 persons – 1 bed) \$ 294
- Dbl/Dbl (2 persons – 2 beds) \$ 294
- Triple (3 persons – 2 beds) \$ 319
- Quad (4 persons – 2 beds) \$ 344
- Government rate Not Available

\* All rates DO NOT include sales tax 14.5 % (subject to change)

Suites and upgraded accommodations are available upon request. Please call ALEC Housing at the number listed above for additional information.

### Special requests

- ADA room required: \_\_\_\_\_ Audio \_\_\_\_\_ Visual \_\_\_\_\_ Mobile \_\_\_\_\_
- Rollaway / crib: \_\_\_\_\_
- Other: \_\_\_\_\_

### METHOD OF HOUSING PAYMENT

Please use the same method of payment as above.

**Credit Card:** Credit Cards will be used to guarantee the reservation.

Amer Express  Visa  MasterCard  Discover

Card # \_\_\_\_\_

Cardholder (please print) \_\_\_\_\_

Exp Date (mm/yy) \_\_\_\_\_ Security Code \_\_\_\_\_

Signature \_\_\_\_\_

**Checks:** Payment must be in U.S. currency drawn on a U.S. bank. Please make check payable to ALEC and send to above address.

**Note:** Cutoff for reservations at the ALEC rate is November 4, 2010. After November 4, 2010, every effort will be made to accommodate new reservations, based on availability and rate.

## HOUSING CONFIRMATION INFORMATION

Online reservations will receive immediate email confirmation. Reservations received by form will be confirmed via email, fax, or mail within 72 hours of receipt.

## HOUSING CANCELLATION / REFUND INFORMATION

Credit cards will be charged one night room and tax in the event of a no show or if cancellation occurs within 72 hours prior to arrival. Departures prior to the departure date confirmed by the hotel at check-in will result in a charge of one night room and tax. Please obtain a cancellation number when your reservation is cancelled.

# SPOUSE / GUEST REGISTRATION / HOUSING FORM

December 1-3, 2010

AMERICAN LEGISLATIVE EXCHANGE COUNCIL **ALEC**

Grand Hyatt Washington  
Hotel  
1000 H Street, NW  
Washington, DC 20001



Grand Hyatt Washington

Online  
www.alec.org

Fax (credit cards only)  
202.331.1344

Phone / Questions • Mon-Fri, 8am-5:30 pm Eastern  
202.742.8538

Mail • ALEC Registration & Housing  
P.O. Box 96754 • Washington, DC 20090-6754

## ATTENDEE INFORMATION IS REQUIRED TO REGISTER A SPOUSE OR GUEST

Prefix (required)  Sen  Rep  Del  Mr  Mrs  Ms  Other \_\_\_\_\_

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ Middle Initial \_\_\_\_\_ Badge Nickname \_\_\_\_\_

Title \_\_\_\_\_

Organization (required) \_\_\_\_\_

Address \_\_\_\_\_ Suite # \_\_\_\_\_

City \_\_\_\_\_ State/Province \_\_\_\_\_ Country \_\_\_\_\_ ZIP/Postal code \_\_\_\_\_

Daytime phone \_\_\_\_\_ Fax \_\_\_\_\_ Alternate phone \_\_\_\_\_

Email (confirmation will be sent by email) \_\_\_\_\_

## SPOUSE / GUEST REGISTRATION

### SPOUSE / GUEST REGISTRATION GUIDELINES

1. Spouse / guest registration is meant to accommodate legal spouse and immediate family members.
2. Attendees from the same organization must register independently. No exception will be made.
3. Spouse / guest designation will be clearly visible on name badge.
4. Spouse / guest registrants are not eligible to attend ALEC Task Force meetings.

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ Middle initial \_\_\_\_\_ Badge Nickname \_\_\_\_\_

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ Middle initial \_\_\_\_\_ Badge Nickname \_\_\_\_\_

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ Middle initial \_\_\_\_\_ Badge Nickname \_\_\_\_\_

SPOUSE / GUEST REGISTRATION FEES	Number of Spouse/Guest(s)	Early Until 11/10	On-Site Begin 11/11	TOTAL
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Spouse / Guest *please note name(s) above* \_\_\_\_\_ \$ 150 \$ 150 \$ \_\_\_\_\_

### METHOD OF SPOUSE / GUEST REGISTRATION PAYMENT

Credit Card: Credit cards will be charged immediately. Please fax to the above number for processing.

<input type="checkbox"/> Amer Express	Card # _____
<input type="checkbox"/> Visa	Cardholder (please print) _____
<input type="checkbox"/> MasterCard	Exp Date (mm/yy) _____ Security Code _____ Signature _____

Checks: Payment must be in U.S. currency drawn on a U.S. bank. Please make check payable to ALEC Registration and send to above address.

Note: If registering after November 10, please bring completed form and payment to register on-site.

### REGISTRATION CONFIRMATION INFORMATION

Online registrants will receive immediate email confirmation to the address provided above. If registering by form, confirmation will be emailed, faxed, or mailed within 72 hours of receipt of payment.

### REGISTRATION CANCELLATION / REFUND INFORMATION

Registrations cancelled prior to 5pm Eastern November 10, 2010 are subject to a \$100 cancellation fee. Registrations are non-refundable after 5pm Eastern November 10, 2010.



## **Mission Statement**

The American Legislative Exchange Council's mission is...

To advance the Jeffersonian Principles of free markets, limited government, federalism, and individual liberty through a nonpartisan public-private partnership among America's state legislators, concerned members of the private sector, the federal government, and the general public.

To promote these principles by developing policies that ensure the powers of government are derived from, and assigned to, first the People, then the States, and finally the Federal Government.

To enlist state legislators from all parties and members of the private sector who share ALEC's mission.

To conduct a policy making program that unites members of the public and private sector in a dynamic partnership to support research, policy development, and dissemination activities.

To prepare the next generation of political leadership through educational programs that promote the principles of Jeffersonian democracy, which are necessary for a free society.

## SCHOLARSHIP POLICY BY MEETING

### ***ALEC Spring Task Force Summit:***

1. ***Spring Task Force Summit Reimbursement Form:*** ALEC Task Force Members are reimbursed by ALEC up to a predetermined set limit for travel expenses. Receipts must be forwarded to the ALEC Policy Coordinator and approved by the Director of Policy.
2. ALEC Task Force Members' room & tax fees for a two-night stay are covered by ALEC.
3. *Official Alternate Task Force Members* (chosen by the State Chair and whose names are given to ALEC more than 35 days prior to the meeting to serve in place of a Task Force Member who cannot attend) are reimbursed in the same manner as Task Force Members.
4. ***State Scholarship Reimbursement Form:*** Any fees above the set limit, or expenses other than travel and room expenses can be submitted by Task Force Members for payment from their state scholarship account upon the approval of the State Chair. Receipts must be submitted to the State Chair, who will submit the signed form to the Director of Membership.
5. *Non-Task Force Members* can be reimbursed out of the state scholarship fund upon State Chair approval. Receipts must be submitted to the State Chair, who will submit the appropriate signed form to the Director of Membership.

### ***ALEC Annual Meeting:***

***State Scholarship Reimbursement Form:*** State scholarship funds are available for reimbursement by approval of your ALEC State Chair. Expenses are reimbursed after the conference, and may cover the cost of travel, room & tax, and registration. Receipts are to be submitted to the State Chair, who will then submit the signed form to the Director of Membership.

### ***ALEC States & Nation Policy Summit:***

1. ***States & Nation Policy Summit Reimbursement Form:*** ALEC offers two scholarships per state to cover the cost of travel, room & tax, and registration not to exceed \$1,000.00 per person for a total of \$2,000.00 per state. ALEC scholarship recipients must be named by the ALEC State Chair. Expenses are submitted to the State Chair and reimbursed after the conference. The State Chair submits the signed form to the Director of Membership.
2. ***State Scholarship Reimbursement Form:*** Any other fees or payments must come out of the state scholarship account, with the approval of the State Chair. Receipts must be submitted to the State Chair, who submits the signed form to the Director of Membership.

### ***ALEC Academies:***

***Academy Reimbursement Form:*** Attendees of ALEC Academies are reimbursed by the Task Force Committee hosting the Academy. Attendees will receive a form at the Academy, and will be reimbursed up to \$500.00 for travel, and room & tax fees for a two-night stay by ALEC. Receipts must be forwarded to the appropriate Task Force Director and approved by the Director of Policy.



## **American Legislative Exchange Council TASK FORCE OPERATING PROCEDURES**

### **I. MISSION OF TASK FORCES**

Assume the primary responsibility for identifying critical issues, developing ALEC policy, and sponsoring educational activities which advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty. The mission will be accomplished through a non-partisan, public and private partnership between ALEC's legislative and private sector members in the specific subject areas assigned to the Task Force by the Board of Directors.

### **II. TASK FORCE RESPONSIBILITIES**

- A. Task Forces have the primary responsibility for identifying critical issues and developing ALEC's official policy statements and model legislation appropriate to the specific subject areas of the Task Force.
- B. Task Forces serve as forums for an exchange of ideas and sharing of experiences between ALEC's state legislator and private sector members.
- C. Task Forces are responsible for developing and sponsoring the following educational activities appropriate to the specific subject area of the Task Force:
  - publications that express policy positions, including, but not limited to State Factors and Action Alerts;
  - educational communication and correspondence campaigns;
  - issue specific briefings, press conferences and press campaigns;
  - witness testimony and the activities of policy response teams;
  - workshops at ALEC's conferences; and
  - specific focus events.
- D. The Executive Director is to Task Forces are responsible for developing an annual budgets, which shall include expenses associated with Task Force meetings and educational activities. A funding mechanism to finance all meetings and educational activities proposed by Task Forces must be available before they can be undertaken.

### ***III. GENERAL PROCEDURES***

- A.** Requests from ALEC members for policy statements, model legislation and educational activities shall be directed by the Executive Director to the appropriate Task Force, or the Board of Directors if the issue does not fall within the jurisdiction of any Task Force. The appropriate Public and Private Sector Task Force Co-Chairs determine the agenda for each Task Force meeting, and the meetings will be called and conducted in accordance with these Operating Procedures.

The Director of Policy with the consent of the Executive Director assigns a model bill or resolution to the most appropriate Task Force based on Task Force content and prior jurisdictional history 35 days before a Task Force Meeting. All Task Force Co-Chairs will be provided an email or fax summary of all model bills and resolutions 35 days before the Task Force meeting

If both the Co-Chairs of a Task Force are in agreement that they should have jurisdiction on model legislation or a resolution, the legislation or resolution will be considered by the Task Force. If the other Task Force Co-Chairs believe they should have jurisdiction or if the author of the model bill or resolution does not agree on the jurisdictional assignment of the bill, they will have 10 days after the 35-day mailer deadline to submit in writing or by electronic appeal to the Director of Policy their intent to challenge the jurisdiction assignment. The Director of Policy will notify the Executive Director who will in turn notify the National Chair and the Private Enterprise Board Chair. The National Chair and the Private Enterprise Board Chair will in turn refer the matter in question to the Board of Directors Task Force Board Committee. The Director of Policy will establish a conference call for the Task Force Board Committee co-chairs, the author, the affected Task Force Co-Chairs and the Director of Policy at a time convenient for all participants.

The Task Force Board Committee Co-Chairs shall listen to the jurisdictional dispute by phone or in person within 10 days of the request. If both Task Force Board Committee Co-Chairs are in agreement that the Director of Policy made an incorrect jurisdictional referral, only then will the model bill or resolution be reassigned to a committee as they specify once agreed upon by the National Chair and the Private Enterprise Board Chair. The bill or model resolution is still eligible to be heard in whatever Task Force it is deemed to be assigned to as if submitted to the correct Task Force for the 35-day mailer. The National Chair and the Private Enterprise Board Chair decision is final on this model bill or resolution.

Joint referral of model legislation and/or resolutions are allowed if all the affected Task Force Co-Chairs agree. All model legislation and resolutions that have been referred to, more than one Task Force must pass the identical language in both Task Forces within two consecutive Task Force meetings. It is at the Task Force

Co-Chairs discretion how they will handle the hearings of the model legislation or resolution. Both sets of co-chairs have the ability to call a working group, subcommittee, or simply meet consecutively or concurrently if necessary.

If the Task Force co-chairs both agree to waive jurisdiction, they may do so as long as another Task Force still has jurisdiction.

The National Chair and the Private Sector Board Chair will rely upon the Task Force Board Committee Co-Chairs for advice and recommendations on model legislation or resolutions when no jurisdiction in any of the existing Task Forces in operation can be found. The Task Force Board Committee Co-Chairs will work with the Executive Director and the Director of Policy to identify public and private sector Task Force members (not alternates) from the existing Task Forces should their expertise be of assistance to the Task Force Board Committee in reaching a determination and recommendation for approval by the National Chair and the Private Enterprise Board Chair.

- B. The National Chair and the Private Sector Board Chair will rely upon the Task Force Board Committee Co-Chairs for advice and recommendations on model legislation or resolutions when no jurisdiction in any of the existing Task Forces in operation can be found. The Task Force Board Committee Co-Chairs will work with the Executive Director and the Director of Policy to identify public and private sector Task Force members (not alternates) from the existing Task Forces should their expertise be of assistance to the Task Force Board Committee in reaching a determination and recommendation for approval by the National Chair and the Private Enterprise Board Chair.
- C. The Board of Directors shall have ultimate authority over Task Force procedures and actions including the authority to create, to merge or to disband Task Forces and to review Task Force actions in accordance with these Operating Procedures. Nothing in these Operating Procedures prohibits the Board of Directors from developing ALEC policy; however, such a practice should be utilized only in exceptional circumstances. Before the policy is adopted by the Board of Directors, it should be sent to the Public and Private Sector Task Force Co-Chairs under whose jurisdiction the matter falls for review and comment back to the Board of Directors.
- D. The operating cycle of a Task Force is two years. A new operating cycle begins on January 1 of each odd numbered year and ends on December 31 of the following even numbered year. Task Force activities shall be planned and budgeted on an annual basis within each two-year operating cycle.
- E. ~~At the ALEC Annual Meeting, each Task Force will be responsible for determining an operating budget for the succeeding calendar year. The Executive Director will notify the Task Force Co-Chairs, at the ALEC Annual Meeting, what inflation factor will be used by the Task Force to determine the operating~~

~~and programming budgets. Task Force membership and budget information will be reported to the Executive Director by the Public and Private Sector Task Force Co-Chairs. The Executive Director will present this information to the Board of Directors at its regular fall meeting.~~

- F. If a Task Force is unable to develop an operating budget, the Board of Directors will determine whether to continue the operations of the Task Force. This determination will be made according to: (1) the level of membership on the Task Force, and (2) the need for continued services developed by the Task Force for ALEC.
- G. The Board of Directors shall have the authority to allocate limited general support funds to finance the annual operating budget of Task Forces that meet the requirements prescribed in Section III (E). The Executive Director shall determine, and report to the Board of Directors, the amount of general support funds available to underwrite such Task Forces.

#### **IV. MEMBERSHIP AND MEMBER RESPONSIBILITIES**

- A. The membership of a Task Force consists of legislators who are members in good standing of ALEC and are duly appointed to the Task Force, in accordance with Section VI (A) and private sector organizations that are full members of ALEC, contribute to the assessment for the Task Force operating budget, and are duly appointed to the Task Force, in accordance with Section VI (B). Private sector organizations that were full members of ALEC and contributed the assessment for the Task Force's operating budget in the previous year, can be appointed to the Task Force for the current year, conditional upon renewal of full ALEC membership and receipt of the current year's assessment for the Task Force operating budget prior to March 31<sup>st</sup>, unless an alternative date has been approved by the Executive Director.
- B. Each Task Force shall have least two Co-Chairs; a Public Sector Task Force Co-Chair and a Private Sector Task Force Co-Chair. The Public Sector Task Force Co-Chair must be a member of the Task Force and appointed in accordance with Section VI (A). The Private Sector Co-Chair must represent a private sector member of the Task Force and be appointed in accordance with Section VI(B). The Co-Chairs shall be responsible for:
  - (1) calling the Task Force and the Executive Committee meetings to order, setting the agenda and co-chairing such meetings;
  - (2) appointing and removing legislators and private sector members to and from the Task Force Executive Committee and subcommittees;
  - (3) creating subcommittees, and determining each subcommittee's mission, membership limit, voting rules, deadlines, and term of service; and

- (4) selecting Task Force members to provide support for and against Task Force policies during formal Board reviews.
- C. Each Task Force shall have an Executive Committee appointed by the Public and Private Sector Task Force Co-Chairs that is appropriate in number to carry out the work product and strategic plan of ALEC and the Task Force. The Executive Committee shall consist of the Public Sector Task Force Co-chair, the Private Sector Task Force Co-Chair, the subcommittee co-chairs, and the remainder will be an equal number of legislative and private sector Task Force members. The Executive Committee will be responsible for determining the operating budget and proposing plans, programs and budgets for the succeeding year in accordance with (Section V (B); determining if a proposed educational activity conforms to a previously approved model bill, resolution or policy statement in accordance with (Section IX (F); and determining if an emergency situation exists that justifies waiving or reducing appropriate time limits in accordance with (Section VIII (H)).
- D. Each Task Force may have any number of subcommittees, consisting of Task Force members and advisors to focus on specific areas and issues and make policy recommendations to the Task Force. The Task Force Co-chairs, shall create subcommittees and determine each subcommittee's mission, membership limit, voting rules, deadlines, and term of service. Any model bill, resolution or policy statement approved by a subcommittee must be approved by the Task Force before it can be considered official ALEC policy.
- E. Each Task Force may have advisors, appointed in accordance with Section VI (G). Advisors shall assist the members and staff of the Task Force. They shall be identified as advisors on official Task Force rosters, included in all official Task Force mailings and invited to all Task Force meetings. Advisors may also have their expenses paid at Task Force meetings covered by the Task Force operating budget with the approval of the Task Force Co-Chairs. An advisor cannot be designated as the primary contact of a private sector Task Force member, cannot be designated to represent a private sector Task Force member at a Task Force, Executive Committee, or subcommittee meeting, and cannot offer or vote on any motion at a Task Force, Executive Committee, or subcommittee meeting.

## **V. *Task Force Budgets***

- A. Each Task Force shall develop and operate a yearly budget to fund meetings.
- B. The operating budget shall be used primarily to cover expenses for Task Force meetings, unless specific funds within the budget are authorized for other use by the Task Force. The operating budget shall be assessed equally among the private sector members of the Task Force. The Executive Director, in consultation with the Task Force Co-Chairs shall determine which costs associated with each meeting will be reimbursed from the operating budget. Any funds remaining in a

Task Force's operating budget at the end of a year are transferred to ALEC's general membership account.

- C. The operating budget shall not be used to cover Task Force meeting expenses associated with alternate task force members' participation, unless they are appointed by their State Chair to attend the Spring Task Force Summit with the purpose to serve in place of a Task Force Member who is unable to attend. Task Force meeting expenses of alternate task force members shall be covered by their state's scholarship account.
- D. The programming budget shall be used to cover costs associated with educational activities. Contributions to the programming budget are separate, and in addition to operating budget contributions and annual general support/membership contributions to ALEC. The Executive Director shall determine the contribution required for each educational activity.

## **VI. *PROCESS FOR SELECTING TASK FORCE MEMBERS, CHAIRS, COMMITTEES AND ADVISORS***

- A. Prior to February 1 of each odd-numbered year, the current and immediate past National chairman will jointly select and appoint in writing three legislative members and three alternates to the Task Force who will serve for the current operating cycle, after receiving nominations from ALEC's Public and Private State Chairs, the Executive Director and the ALEC Public and Private Sector members of the Board. At any time during the year, the National Chairman may appoint in writing new legislator members to each Task Force, except that no more than three legislators from each state may serve as members of any Task Force, no legislator may serve on more than one Task Force and the appointment cannot be made earlier than thirty days after the new member has been nominated. In an effort to ensure the nonpartisan nature of each Task Force, it is recommended that no more than two legislators of any one political party from the same state be appointed to serve as members of any Task Force. A preference will be given to those ALEC legislator members who serve on or chair the respective Committee in their state legislature. A preference will be given to legislators who sponsor ALEC Task Force model legislation in the state legislature.
- B. Prior to January 10 of each odd-numbered year, the current and immediate past National Chairman will jointly select and appoint in writing the Task Force Chair who will serve for the current operating cycle, after receiving nominations from the Task Force. Nominations will be requested by the outgoing Task Force Chair and may be placed in rank order prior to transmittal to the Executive Director no later than December 1 of each even-numbered year. No more than five names may be submitted in nomination by the outgoing Task Force chair. The current and immediate past National Chairmen will jointly make the final selection, but

should give strong weight to the recommendations of the outgoing Task Force Chair. In an effort to empower as many ALEC leaders as possible, State Chairs and members of the Board of Directors will not be selected as Task Force Chairs. Task Force Chairs shall serve for one operating cycle term. Where special circumstances warrant, the current and immediate past National Chairmen may reappoint a Task Force Chair to a second operating cycle term.

- C. Prior to February 1 of each odd numbered year, the Public and Private Sector Task Force Co-Chairs will select and appoint in writing the legislative and private sector members of the Task Force Executive Committee, who will serve for the current operating cycle. The Public and Private Sector Task Force Co-Chairs will select and appoint in writing the legislative and private sector members and advisors to any subcommittee.
- D. Prior to February 1 of each year, the Private Enterprise Board Chair and the immediate past Private Enterprise Board Chair will select and appoint in writing the private sector members to the Task Force who will serve for the current year. The appointment letter shall be mailed to the individual designated as the primary contact for the private sector entity. At any time during the year, the Chair of the Private Enterprise Board may appoint in writing new private sector members to each Task Force, but no earlier than thirty days after the new member has qualified for full membership in ALEC and contributed the assessment for the appropriate Task Force's operating budget.
- E. Prior to January 10 of each odd-numbered year, the Chair of the Private Enterprise Board and the immediate past Private Enterprise Board Chair will select and appoint in writing the Task Force Private Sector Co-Chair who will serve for the current operating cycle, after receiving nominations from the Task Force. Nominations will be requested by the outgoing Task Force Private Sector Chair and may be placed in rank order prior to transmittal to the Chair of the Private Enterprise Board. The Chair and the immediate past Chair of the Private Enterprise Board will make the final selection, but should give strong weight to the recommendations of the outgoing Private Sector Task Force Co-Chair. In an effort to empower as many ALEC private sector members as possible, Private Enterprise State Chairs and members of the Private Enterprise Board will not be selected as Private Sector Task Force Co-Chairs. Private Sector Task Force Co-Chairs shall serve for one operating cycle term. Where special circumstances warrant, the current and immediate past Chair of the Private Enterprise Board may reappoint a Task Force Private Sector Chair to a second operating cycle term.
- F. Prior to February 1 of each odd-numbered year, the Task Force Private Sector Co-Chair will select and appoint in writing the private sector members of the Task Force Executive Committee, who will serve for the current operating cycle. The Task Force Private Sector Co-Chair shall select and appoint in writing the private sector members of any subcommittees.

G. The Public and Private Sector Task Force Co-Chairs, may jointly appoint subject matter experts to serve as advisors to the Task Force. The National Chair and the Private Enterprise Board Chair may also jointly recommend to the Task Force Co-Chairs subject matter experts to serve as advisors to the Task Force.

## **VII. REMOVAL AND VACANCIES**

- A. The National Chair may remove any Public Sector Task Force Co-Chair from his position and any legislative member from a Task Force with or without cause. Such action will not be taken except upon thirty days written notice to such Chair or member whose removal is proposed. For purposes of this subsection, cause may include failure to attend two consecutive Task Force meetings.
- B. The Public Sector Task Force Co-Chair may remove any legislative member of an Executive Committee or subcommittee from his position with or without cause. Such action shall not be taken except upon thirty days written notice to such member whose removal is proposed. For purposes of this subsection, cause may include failure to attend two consecutive meetings.
- C. The Chairman of the Private Enterprise Board may remove any Private Sector Task Force Co-Chair from his position and any private sector member from a Task Force with cause. Such action shall not be taken except upon thirty days written notice to such Chair or member whose removal is proposed. For purposes of this subsection, cause may include but is not limited to the non-payment of ALEC General Membership dues and the Task Force dues. .
- D. The Private Sector Task Force Co-Chair may remove any private sector member of an Executive Committee or subcommittee from his position with cause. Such action shall not be taken except upon thirty days written notice to such member whose removal is proposed. For purposes of this subsection, cause may include but is not limited to the non-payment of ALEC General Membership dues and the Task Force dues.
- E. The Public and Private Sector Task Force Co-Chairs may remove an advisor from his position with or without cause. Such action shall not be taken except upon thirty days written notice to such advisor whose removal is proposed.
- F. Any member or advisor may resign from his position as Public Sector Task Force Co-Chair, Private Sector Task Force Co-Chair, public or private sector Task Force member, Task Force advisor, Executive Committee member or subcommittee member at any time by writing a letter to that effect to the Public Sector and Private Sector Task Force Co-Chairs. The letter should specify the effective date of the resignation, and if none is specified, the effective date shall be the date on which the letter is received by the Public and Private Task Force Co-Chairs.

G. All vacancies for Public Sector Task Force Co-Chair, Private Sector Task Force Co-Chair, Executive Committee member and subcommittee member shall be filled in the same manner in which selections are made under Section VI. All vacancies to these positions must be filled within thirty days of the effective date of the vacancy.

## **VIII. MEETINGS**

A. Task Force meetings shall only be called by the joint action of the Public and Private Sector Task Force Co-Chairs. Task Force meetings cannot be held any earlier than thirty-five days after being called, unless an emergency situation has been declared pursuant to Section VIII(H), in which case Task Force meetings cannot be held any earlier than ten days after being called. It is recommended that, at least once a year, the Task Forces convene in a common location for a joint Task Force Summit. Executive Committee meetings shall only be called by the joint action of the Public and Private Sector Task Force Co-Chairs and cannot be held any earlier than three days after being called, unless the Executive Committee waives this requirement by unanimous consent.

B. At least forty-five days prior to a task force meeting any model bill, resolution or policy must be submitted to ALEC staff that will be voted on at the meeting. At least thirty-five days prior to a Task Force meeting, ALEC staff shall distribute copies of any model bill, resolution or policy statement that will be voted on at that meeting. This requirement does not prohibit modification or amendment of a model bill, resolution or policy statement at the meeting. This requirement may be waived if an emergency situation has been declared pursuant to Section VIII(H).

C. All Task Force meetings are open to registered attendees and invited guests of ALEC meetings and conferences. Only regular Task Force Members may introduce any resolution, policy statement or model bill. Only Task Force members will be allowed to participate in the Task Force meeting discussions and be seated at the table during Task Force meetings, unless otherwise permitted by the Public and Private Sector Task Force Co-Chairs.

D. ALEC private sector member organizations may only be represented at Task Force and Executive Committee meetings by the individual addressed in the appointment letter sent pursuant to Section VI(D) or a designee of the private sector member. If someone other than the individual addressed in the appointment letter is designated to represent the private sector member, the designation must be submitted in writing to the Public and Private Sector Task Force Co-Chairs before the meeting, and the individual cannot represent any other private sector member at the meeting.

- E. All Task Force and Executive Committee meetings shall be conducted under the guidelines of Roberts Rules of Order, except as otherwise provided in these Operating Procedures. A copy of the Task Force Operating Procedures shall be included in the briefing packages sent to the Task Force members prior to each meeting.
- F. A majority vote of legislative members present and voting and a majority vote of the private sector members present and voting, polled separately, are required to approve any motion offered at a Task Force or Executive Committee meeting. A vote on a motion to reconsider would be only with the sector that made the motion. Members have the right, in a voice vote, to abstain and to vote present by roll-call vote. In all votes a member can change their vote up until the time that the result of the vote is announced. Only duly appointed members or their designee as stated in Section VIII (D) that are present at the meeting may vote on each motion. No proxy, absentee or advance voting is allowed.
- G. The Public Sector Task Force Co-Chair and the Private Sector Task Force Co-Chair, with the concurrence of a majority of the Executive Committee, polled in accordance with Section VIII (F), may schedule a Task Force vote by mail or ~~fax~~ any form of electronic communication on any action pertaining to policy statements, model legislation or educational activity. The deadline for the receipt of votes can be no earlier than thirty-five days after notification of the vote is mailed or ~~faxed~~ notified by any form of electronic communication, unless an emergency situation is declared pursuant to Section VIII (H), in which case the deadline can be no earlier than ten days after notification is mailed or ~~faxed~~ notified by any form of electronic communication. Such votes are exempt from all rules in Section VIII, except: (1) the requirement that copies of model legislation and policy statements be mailed or ~~faxed~~ notified by any form of electronic communication with the notification of the vote and (2) the requirement that a majority of legislative members voting and a majority of the private sector members voting, polled separately, is required to approve any action by a Task Force.
- H. For purposes of Sections VIII(A), (B) and (G), an emergency situation can be declared by:
  - (1) Unanimous vote of all members of the Task Force Executive Committee present at an Executive Committee meeting prior to the meeting at which the Task Force votes on the model bill, resolution or policy statement; or
  - (2) At least three-fourth majority vote of the legislative and private sector Task Force members (voting in accordance with Section VIII (F)) present at the meeting at which the members vote on the model bill, resolution or policy statement.

I. Ten Task Force members shall constitute a quorum for a Task Force meeting. One-half of the legislative and one-half of the private sector members of an Executive Committee shall constitute a quorum for an Executive Committee meeting.

## **IX. *REVIEW AND ADOPTION PROCEDURES***

A. All Task Force policy statements, model bills or resolutions shall become ALEC policy either: (1) upon adoption by the Task Force and affirmation by the Board of Directors or (2) thirty days after adoption by the Task Force if no member of the Board of Directors requests, within those thirty days, a formal review by the Board of Directors. General information about the adoption of a policy position may be announced upon adoption by the Task Force.

B. The Executive Director shall notify the Board of Directors of the approval by a Task Force of any policy statement, model bill or resolution within ten days of such approval. Members of the Board of Directors shall have thirty days from the date of Task Force approval to review any new policy statement, model bill or resolution prior to adoption as official ALEC policy. Within those thirty days, any member of the Board of Directors may request that the policy be formally reviewed by the Board of Directors before the policy is adopted as official ALEC policy.

C. A member of the Board of Directors may request a formal review by the Board of Directors. The request must be in writing and must state the cause for such action and a copy of the letter requesting the review shall be sent by the National Chairman to the appropriate Task Force Chair. The National Chairman shall schedule a formal review by the Board of Directors no later than the next scheduled Board of Directors meeting.

D. The review process will consist of key members of the Task Force, appointed by the Task Force Chair, providing the support for and opposition to the Task Force position. Position papers may be faxed or otherwise quickly transmitted to the members of the Board of Directors. The following is the review and adoption procedures:

- Notification of Committee: Staff will notify Task Force Chairs and the entire task force when the Board requests to review one of the Task Forces' model bills or resolutions.
- Staff Analysis: Will be prepared in a neutral fashion. The analyses will include:
  - History of Task Force action
  - Previous ALEC official action/resolutions
  - Issue before the board
  - Proponents arguments

- Opponents arguments
- Standardized Review Format: To ensure fairness, a set procedure will be used as the format to ensure the model bill/resolution has a fair hearing before the Board.
  - Task Force Chair(s) will be invited to attend the Board Review
  - Task Force Chair(s) will decide who will present in support and in opposition for the model bill/resolution before the Board.
  - Twenty minutes that is equally divided will be given for both sides to present before the Board.
  - It is suggested that the Board not take more than twenty minutes to ask questions of the presenters.
  - Presenters will then be excused and the Board will have a suggested twenty more minutes for discussion and vote.
  - All votes will be recorded for the official record.
- Notification of Committee: The Director of Policy will notify presenters immediately after the vote. If the Board votes to send the model bill/resolution back to the task force, the Board will instruct the Director of Policy or another board member what to communicate.

E. The Board of Directors can:

- (1) Vote to affirm the policy or affirm the policy by taking no action, or
- (2) Vote to disapprove the policy, or
- (3) Vote to return the policy to the Task Force for further consideration providing reasons therefore.

F. Task Forces may only undertake educational activities that are based on a policy statement, model bill or resolution that has been adopted as official ALEC policy, unless the Task Force votes to undertake the educational activity, in which case the educational activity is subjected to the same review process outlined in this Section. It is the responsibility of the Task Force Executive Committee to affirm by three-fourths majority vote conducted in accordance with Section VIII that an educational activity conforms to a policy statement, model bill or resolution.

**X. EXCEPTIONS TO THE TASK FORCE OPERATING PROCEDURES.**

Exceptions to these Task Force Operating Procedures must be approved by the Board of Directors.

## TRANSPARENCY IN LAWSUITS PROTECTION ACT

It may be surprising but, on occasion, courts create new causes of action to sue based on statutes, regulations, or other legislation. These rights are “implied” by courts; they are not based on explicit language in the statute. Lawsuits resulting from this practice are sometimes referred to as “implied causes of action.”

Courts have found an “implied cause of action” based on their view of legislative “intent” at the time a law was enacted. When this occurs, defendants are exposed to unexpected liability. The lack of an express statement by a state legislature also results in uncertainty for plaintiffs who may go through years of costly litigation only for a court to find that private claims were not “intended” by the legislature. In addition, placing enforcement of public laws in the hands of private lawyers rather than exclusively with government agencies may have significant adverse public policy implications. It may affect the interpretation and application of the law, remove administrative discretion in prosecuting violations, and lead to lawsuits driven by profit rather than the public interest.

Many states apply a test for determining whether the legislature intended to create a private cause of action similar to the test established by the U.S. Supreme Court for federal law. In deciding the availability of private claims, courts consider whether (1) the plaintiff is a member of the class for whom the statute was enacted; (2) there is an indication of legislative intent to create or deny an implied remedy; (3) a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) the cause of action is one traditionally relegated to state law. *See Cort v. Ash*, 422 U.S. 66 (1975). While these factors may appear to be clear, in actual practice they are not. Each one is filled with subjective words that may lead courts to reach a decision that may not reflect the legislature’s actual intent. The test is inconsistently applied and leaves plaintiffs, defendants, government agencies, and the courts guessing as to the legislature’s intent on so important an issue. In fact, courts have occasionally reached different conclusions with regard to the same statute, finding no private right of action in some cases, but permitting lawsuits in others.

The Transparency in Lawsuits Protection Act provides a commonsense way of infusing greater clarity in the legislative process; namely, by requiring that state legislatures be explicit about new avenues to sue, and prohibiting courts from creating new claims on their own without an explicit expression of legislative intent. The model act recognizes that whether a law creates a private right of action is a significant public policy decision that should be reached by the legislature after close consideration and deliberation. The act would eliminate confusion in the courts, needless litigation, and inconsistent results. If a law is to include a new private right of action, then fundamental principles of transparency and fairness suggest that it explicitly do so.

In addition, the model act prevents courts from circumventing the essential purpose of the act by applying the same requirement for state legislatures to be explicit about creating an affirmative duty of care from a statute or regulation. A touchstone of

American law is that a person or entity generally owes no duty to rescue or assist another. Affirmative duties represent an exception to this general rule and require a person or entity to act to rescue or reduce risks of harm to another. When an affirmative duty is breached, liability generally results. Thus, as a practical matter, an implied cause of action and recognition of an implied affirmative duty that does not exist under the common law both result in new and unexpected liability. The model act provides that courts seeking to create such an affirmative duty of care under statute can only do so where the legislature expressly states that intention.

Importantly, the model act does not otherwise impact courts' ability to develop common law or use the violation of a statute as evidence of negligent or unlawful conduct in court. This is made explicit in the model act to avoid any confusion. The model act only relates to the creation of implied causes of action and implied affirmative duties. For example, a court could still look to a law requiring drivers not to exceed 65 mph as evidence of a particular driver's negligence in driving 80 mph. Similarly, a court would be free to develop and recognize any new duties under the common law; the model act only states that a court cannot use a statute to do so unless it is stated in the statute.

Thus, the overall effect of the model act is simple: the legislature must clearly state how law is to be enforced, and it is not the role of the judiciary to step in the legislature's shoes to make that policy judgment.

## **Model Legislation**

**Section 1. {Title}.** This Act may be known as the Transparency in Lawsuits Protection Act.

**Section 2. {Purpose}.** The purpose of this Act is to ensure that any legislative act, regulatory or otherwise, in this State shall not create a private right of action or affirmative duty unless such a right or duty is expressly stated in the legislation.

**Section 3. {Transparency Required}.** Any legislation enacted in this State creating a private right of action or affirmative duty of care shall contain express language providing for such a right or duty. Courts of this state shall not construe a statute to imply a private right of action or affirmative duty in the absence of such express language. This provision does not in any way impair courts' ability to develop causes of action or duties under the common law in the absence of a legislative act, or use the violation of a statute to show negligent or unlawful conduct.

**Section 4. {Effective Date}.** This Act is effective upon enactment and shall apply to any action that has not yet been initiated or is pending on the date of enactment of this Act.

## **Explanation of Amendment: Transparency in Lawsuits Protection Act**

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The Transparency in Lawsuits Protection Act injects much needed clarity in the legislative process by providing that state legislatures be explicit about creating new avenues to sue. The Act specifically prohibits courts from acting in a manner that is potentially inconsistent with the intent of the legislature, and independently authorizing a new basis for liability under a statute or other law where it has never before existed. In doing so, the model Act promotes greater transparency and fairness in litigation.

The original Act, now law in Georgia, addresses this transparency issue directly through what have traditionally been called “implied causes of action.” Implied causes of action are new private rights to sue not based upon the express language in a statute; the basis to bring the lawsuit is determined by what the court “thinks” the legislature intended. Such an approach is highly subjective, unpredictable, and inconsistent. The model Act simply takes the inquiry out of courts’ hands and provides that the legislature must clearly state how law is to be enforced if private enforcement is indeed intended.

Recently, the American Law Institute (ALI) approved the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*. It contains several new and unprecedented expansions of liability that threaten to undermine the basic purpose of the model Act. Specifically, the chapter dealing with affirmative duties of care may provide courts with a more subtle way to circumvent the Act and create new liability where a statute does not expressly provide a new right to sue or any other form of additional liability.

Under the new Restatement, courts are authorized to “imply” affirmative duties of care based upon their reading of a statute or other law where the duty does not exist under common law. An enduring part of American legal tradition is that a person or entity generally owes no duty to rescue or assist another. Affirmative duties represent an exception to this general rule and require a person or entity to act to rescue or reduce risks of harm to another. When they fail to do so, liability can result. Thus, as a practical matter, the finding of a new affirmative duty opens the door to liability the same way as an implied cause of action; the breach of a new affirmative duty imposes new liability.

The concern arising from the new Restatement is that in light of the Act as originally adopted, courts aware of the fact they are not permitted to imply new causes of action will, instead, simply imply an affirmative duty to create new liability. The revised model Act prevents courts from circumventing the Act’s essential purpose by applying the same requirement that state legislatures be explicit about creating an affirmative duty of care from a statute or regulation. At the same time, the revised Act makes clear that it does not impact the inherent authority of the judiciary to develop common law, which includes recognition of new causes of action and affirmative duties. Under the revised Act, courts simply cannot use a statute or other legislative act to justify upending the common law unless that law expressly states the legislature’s intent to do so.

The new language effectuating this change is underlined in the revised model Act.

# **RESOLUTION REGARDING CODIFICATION OF THE JUDICIAL *CY PRES* DOCTRINE**

## **SUMMARY**

This resolution responds to efforts by the plaintiffs' bar, represented by the American Association for Justice and its state level affiliates, to encourage courts to adopt or legislatures to enact state laws requiring that any residual funds at the end of a class action (after either a settlement or a verdict) be distributed to charities and non-profit groups approved by the court. Such distributions are referred to as "*cy pres*" awards.

The *cy pres* doctrine was developed at common law to redefine the purpose of a charitable trust fund if the original purpose of the trust ceased to exist when the trust itself provided no alternative. For example, a trust created solely for the purpose of providing medical care for veterans of the Civil War would have ceased to have a purpose upon the demise of the last such veteran. In that circumstance, a court would look to the purpose of the trust and seek to find an analogous charitable use, e.g., have the trust provide funds to VA hospitals instead. Otherwise the trust would lapse without anyone to whom to distribute its funds.

This common law doctrine has been misapplied and abused by some courts in recent years as a justification for class treatment of claims that would not otherwise be subject to class certification, to distribute damage awards or settlement funds to persons who were not members of the class, to thwart the will of settling parties, to increase the amount of attorney fees claimed by class counsel, to spawn additional litigation, and as political fodder for some plaintiffs' counsel and judges through favoritism for certain charities.

Historically, parties in civil litigation have been free to contract for the disposition of any unclaimed class settlement funds, such funds generally being retained by or remitted to the settling defendant. Alternatively, settling parties may provide for disposition to a charity or institution representative of the claimants' interests. Whether in the context of a settlement or judgment, class counsel's attorney fees often are expressed as percentage of funds actually disbursed. Class counsel has a strong incentive to identify, locate and assure disbursements to the actual class members that the attorney is serving. Utilizing *cy pres* disbursements may serve to reduce class counsel's dedication to class members, particularly if attorneys' fees are calculated as a percentage of the lump sum awarded as opposed to the funds actually disbursed to class members.

ALEC is concerned that such misapplication of *cy pres* in the class action context, particularly by courts acting without transparent, consistent, objective standards and safeguards, could: discourage plaintiffs' counsel from ensuring that money recovered in class actions be provided to the allegedly injured class members on whose behalf the actions were brought; undermine the ability of parties to contract for any other form of disposition of unclaimed funds; create potential conflicts of interest; encourage collusive settlements; encourage filing specious class cases in which many or most class members

cannot be identified or located; improperly place judges in the position of ranking the worthiness of charities; reduce state economic development; and reduce state tax revenue.

While ALEC would prefer that *cy pres* not be employed in a class action context at all, ALEC resolves to offer some guidance for courts that insist on utilizing the doctrine.

## **PURPOSE**

Educating state legislators regarding the dangers of judicial misapplication of the *cy pres* doctrine in the context of class action litigation, encouraging them to resist efforts to mandate use of *cy pres* in class action cases, and to provide them with the tools to protect the interests of all parties to class litigation from abuse of the doctrine.

**WHEREAS**, parties to a class action settlement have the right to contract, subject to ultimate court approval, to dispose of any unclaimed settlement funds as they see fit, with the funds often being retained by or remitted to the settling defendant. Class counsel's attorney fee often is expressed as a percentage of settlement funds actually claimed, giving class counsel incentive to assure that as many class members as possible are identified, located, and paid;

**WHEREAS**, the *cy pres* doctrine, having been developed to redefine the purpose of charitable trust funds if the original purpose of the trust ceased to exist, was neither designed nor purposed to distribute excess funds from class actions;

**WHEREAS**, *cy pres* is a legal doctrine under which courts, in limited circumstances, may distribute funds originally intended for one purpose or entity to another similar purpose or entity;

**WHEREAS**, legislation that would reduce abuses associated with judicial misapplication of *cy pres* in a class action context may be beneficial, but should not be intended to condone or encourage any use of the doctrine in a class action, nor to undermine or negate litigation parties' freedom of contract;

**WHEREAS**, to the extent class counsel's attorney fees are based on the total sum distributed, if funds go to nonparty charities rather than to class members, *cy pres* may undermine class counsel's duty to zealously identify and locate class members;

**WHEREAS**, utilization of *cy pres* as a justification for class certification or the distribution of class damages incentivizes class counsel: (a) to divert funds from injured class members and to uninjured charitable organizations; and (b) to then use those charitable donations to publicly promote themselves, it could create a conflict of interest between plaintiffs' counsel and their clients;

**WHEREAS**, utilization of *cy pres* to distribute class damage awards could encourage juries to render larger verdicts in class actions in the hope of benefiting charitable endeavors;

**WHEREAS**, application of the *cy pres* doctrine as a justification for class certification when some class members cannot be identified or when individual class members' damages cannot be ascertained encourages the filing of doubtful or meritless class actions, as well as the filing of class claims that would not otherwise meet the rubrics and procedural protections prerequisite to class certification;

**WHEREAS**, to the extent *cy pres* mandates distribution of class damages to non-class member third parties, it would create an incentive to defendants to make smaller settlement offers, since there would be no prospect that any unused portion of a settlement fund would be returned to the defendant;

**WHEREAS**, to the extent legislation mandates unclaimed judgment amounts be distributed using *cy pres* as opposed to returned to the party paying them, it would discourage class counsel from accepting pre-trial settlements, thereby driving up the cost of litigation and deterring economic development;

**WHEREAS**, application of *cy pres* to class action settlements or judgments would essentially result in a civil fine for defendants in cases where class counsel do not locate all eligible class members or class members do not collect all the proceeds of a settlement fund;

**WHEREAS**, the *cy pres* doctrine in a class action context has the perverse effect of promoting litigation by potentially funding litigation-related charities, foundations, or advocacy groups (such as those funded through Act 95 in Illinois, which takes all unclaimed class action funds and dedicates at least 50 percent to organizations like the bar association and legal aid organizations that "ha[ve] a principal purpose of promoting or providing services that would be eligible for funding under the Illinois Equal Justice Act.<sup>1</sup>");

**WHEREAS**, absent stringent safeguards, application of *cy pres* would improperly empower elected state court judges to divert class action awards from the intended recipients to charities, potentially advancing the judges' political interests and creating conflicts of interest;

**WHEREAS**, to the extent the charity selection process is not fully transparent and does not explicitly forbid favoritism or the possible perception of self-serving conduct, *cy pres* threatens to undermine the integrity of the judiciary;

**WHEREAS**, *cy pres* in a class action context would prevent funds not claimed by actual class members from being returned to the defendant, which could decrease funds available for defendant businesses to create jobs, promote economic development and give tax revenue to the state;

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<sup>1</sup> See 735 ILCS 5/2-807

**THEREFORE, BE IT RESOLVED**, that the American Legislative Exchange Council opposes legislation that would mandate application of the *cy pres* doctrine to class action judgments or settlements, particularly without the legislative safeguards outlined below;

**BE IT FURTHER RESOLVED**, that the American Legislative Exchange Council opposes use of the *cy pres* doctrine in a class action context as any form of justification for certification of a class action, or that would in any fashion limit or undermine the procedural rules or due process requirements that must be met for class certification or identification of class members;

**BE IT FURTHER RESOLVED**, that the American Legislative Exchange Council endorses limiting class counsels' fees to a percentage of funds actually paid to class members;

**BE IT FURTHER RESOLVED**, that the American Legislative Exchange Council, to the extent that a state chooses to recognize utilization of the *cy pres* doctrine to distribute unclaimed class action settlement and judgment amounts that the parties have not otherwise provided for, determines the following procedural protections should be adhered to:

- A.** In a case tried to a jury, the jury shall not be informed that *cy pres* will or may be utilized to pay any portion of a settlement or judgment to a third party who is not a class member;
- B.** *Cy pres* shall not be utilized in any manner as a justification for maintenance of a class action, as any basis for certification of a class, or as in any manner to waive, diminish or limit any procedural and due process requirements for certification or maintenance of a class action;
- C.** *Cy pres* shall not be regarded as the default, preferred, endorsed or primary means of disposing of unclaimed settlement or judgment amounts, the preferred methodology being the negotiated agreement of the parties for the disposition of such funds;
- D.** *Cy pres* shall not in any manner relieve class counsel of the duty of due diligence and zealous efforts in the identification of class members;
- E.** *Cy pres* shall not in any manner interfere with or adversely affect the legal right of the parties to negotiate and agree on the disposition of any unclaimed settlement or judgment funds including the release or return to the paying defendant(s) of any such unclaimed funds;
- F.** Attorney fees awarded to class counsel shall be based on amounts actually distributed to class members, and shall not be based on or include in the calculation of attorney fees any amount awarded to non-class members under *cy pres*,

**G.** In determining the charity or charities that will be the beneficiaries of a *cy pres* award, the court shall

1. Solicit recommendations from counsel for all parties to the class settlement or judgment;
2. Hold a hearing in open court at which counsel for the parties to the settlement or judgment shall have an opportunity to be heard;
3. Seek to make the awards to such charities as would be the best alternatives to class members who cannot be identified, contacted, or who fail to submit an eligible claim;
4. Not make an award to a charity in which the judge, counsel for any party, or anyone related to any of them within the second degree, holds any office, is employed by, is trustee for, holds a financial interest in, or is a beneficiary of;
5. Issue a written order with findings and conclusions as to why and how the charity was chosen, and any limitations, reporting or restrictions on the award otherwise proper and necessary.